

No. 5378

IN THE

**United States Circuit Court
of Appeals**

FOR THE

NINTH CIRCUIT

HONG CHOW DUCK,

Appellant,

VS.

JOHN D. NAGLE, as Commissioner of Im-
migration for the Port of San Francisco,
California,

Appellee.

BRIEF FOR APPELLEE

GEO. J. HATFIELD,

United States Attorney.

T. J. SHERIDAN,

Asst. United States Attorney.

Attorneys for Appellee

FILED
MAY 28 1928



No. 5378

IN THE

United States Circuit Court
of Appeals

FOR THE

NINTH CIRCUIT

HONG CHOW DUCK,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Im-
migration for the Port of San Francisco,
California,

Appellee.

BRIEF FOR APPELLEE

STATEMENT

This is an appeal from the order of the District Court of the Northern District of California denying a petition for a writ of habeas corpus. The writ was sought for to test the validity of the order of the Secretary of Labor deporting petitioner from the United States as an alien not entitled to reside therein.

Petitioner Hong Chow Duck is a Chinese person who arrived at the port of San Francisco on the 3rd of January 1924, and was then admitted to the United States. On the 25th of May 1927, the Secretary of Labor issued a warrant directing the arrest of petitioner, and that he be accorded a hearing upon the charge (Ex. "A" 58)

"that the alien

HONG CHOW DUCK,

who landed at the port of San Francisco, Calif., ex SS "President Taft", on . . . the 3rd day of January, 1924, is subject to be taken into custody and returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit:

The Chinese exclusion law, in that, he has been found within the United States in violation of section 6, Chinese exclusion act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence." (Ex. "A" 58.)

Thereupon petitioner was allowed a hearing before a local inspector and testimony was taken before an immigrant inspector, petitioner appearing by counsel and being permitted to submit testimony; at the conclusion of the hearing the inspector made the following summary of the case: (Ex. "A" 14, 13, 12)

“U. S. DEPARTMENT OF LABOR
IMMIGRATION SERVICE

12020/10735

HONG CHOW DUCK

SUMMARY:

Hong Chow Duck was born in China of a Chinese father, also of Chinese nativity. He first came to the United States on the S.S. “Pres. Taft” and was admitted by a B. S. I. as the minor son of a Chinese merchant, Mar. 25, 1924, S. F. 22926/4-15. On Oct. 22, 1924, about seven months after the alien’s admission Inspector L. A. Root made an investigation at Alameda, his report thereon indicating that Hong Kun, the father of Hong Chow Duck, was a laborer, a clam digger, during the year immediately preceding the arrival of Hong Chow Duck at this port. Since that time other investigations were made at Alameda and elsewhere with the results that the belief concerning Hong Kun’s occupation was confirmed.

On July 11, 1924, Hong Chow Jung sought admission as a son of Hong Kun, a merchant, and as a result of the disclosures contained in the reports of investigation above mentioned, he was excluded by a Board and deported without appealing from the Board’s decision. Before his actual deportation took place, however, his father Hong Kun, the manager of the store in which Hong Kun claimed an active partnership, and others, including the statutory white witnesses, were indicted, charged with conspiring to unlawfully effect the admission of Hong Chow Jung to this country. Many white witnesses testified before the Grand Jury returning the indictment and before the Jury hearing the evidence. The preponderance of the testimony from the witness stand at the trial was to the effect that Hong Kun had been a clam digger throughout the year preceding the arrival of Hong Chow Jung. The United States Attorney, becoming convinced that

the two white witnesses, Messrs. Arnone and Castro, had been misled and imposed upon, pursuant to having them testify before this Service on the mercantile status of Hong Kun, made representation to the Court resulting in the dismissal of the indictment as to those two men. They were, however, called as witnesses by the defense and testified in part as they had testified before this Service. The Jury returned a verdict of acquittal as to all defendants.

It having been developed by the testimony of the Government witnesses that the first six months of the statutory period, during which Hong Kun was alleged to be a merchant in the Hong Chow Jung case, 23517/5-9, was the last six months of the statutory period in the case of Hong Chow Duck, it was apparent that Hong Chow Duck's father, Hong Kun, was not a merchant within the meaning of the Chinese Exclusion Act for the year preceding the arrival at this port of his son Hong Chow Duck. A warrant of arrest for Hong Chow Duck was therefore applied for and said warrant was issued Feb. 1, 1927, by the second Assistant Secretary of Labor, copy of said warrant being made a part of this record. The alien was taken into custody by the undersigned Feb. 16, 1927, and released on bond in the amount of \$3000.00 the same day. Hearings have been conducted at which the alien was represented by Attorneys John L. McNab and Bert Schlesinger. The alien testified on his own behalf. Attorney McNab also testified. There were introduced as evidence on behalf of the Government transcript of excerpts of testimony given in Court by the Government witnesses in the conspiracy case the U. S. vs. Hong Kun, et al and the alien was informed that the files of this Station in the cases of himself and his brother would be submitted with the record of hearing in this case to the Secretary of Labor for his consideration as well as the file concerning the alien's father's trips to and from China. At the hearing under this war-

rant, no evidence of whatsoever character was introduced controverting the claim of the Government that Hong Kun was a laborer during the year preceding the arrival of Hong Chow Duck. The preponderance of the documentary evidence contained in the exhibits and records at this Station is conclusive, I believe, that Hong Kun was in fact a laborer and not a merchant during that period. It is true that Hong Chow Duck was landed by a Board of Special Inquiry after an investigation conducted entirely at the Angel Island Immigration Station but subsequent to that action, investigation disclosed that Hong Kun had testified falsely concerning his status and that knowledge resulted in the exclusion of his second son to arrive, Hong Chow Jung, and the institution of the criminal proceedings and the issuance of the warrant of arrest in this case.

It should be borne in mind that Hong Chow Duck and his father Hong Kun were not charged in the indictment with unlawfully securing the admission of a Chinese but were charged with conspiring with others to bring about the admission of defendants is no bar to the present proceedings.

An unsuccessful effort was made to secure the release from the files of the United States Attorney of the Court Reporter's transcript of the conspiracy trial for use in this case. Lacking that the copies of excerpts of testimony of the Government witnesses were made. At the hearing under this warrant the alien's attorneys stated they would offer as evidence the complete record of the conspiracy trial made by the reporter for the defendants. This was not done, however, the attorneys contenting themselves with submitting with their brief, or rather as an exhibit, a copy of the indictment and reporter's transcript of the Court's charge to the Jury and verdict. Owing to the lack of the complete Court record, the testimony of the witnesses Castro and Arnone cannot be referred to but it is the writer's recollection that they testified to the effect that they knew

Hong Kun to be a merchant from the fact that they made business calls at the store in which Hong Kun claimed membership, the witness Castro on Mondays and Fridays of each week and the witness Arnone on Tuesdays of each week, and further, because they had been told by the manager of the store that Hong Kun was an active partner therein. These men are salesmen and made their visits to the store at approximately the same hours each visit, and it may easily be seen that it would be a simple matter for Hong Kun to be in evidence practically every time they called and still pursue his occupation as a clam digger. The Government witnesses in the conspiracy trial testified to the effect that Hong Kun dug clams, shelled them and carried them from Alameda to San Francisco, a distance of ten or more miles, in tin buckets, and during the year involved, lived in a shack on the waterfront near the clam beds.

It is true that the Board of Special Inquiry which admitted Hong Chow Duck to this country at that time conceded Hong Kun to be a merchant on the evidence presented to that Board. The verdict of the Jury acquitting the defendant in the conspiracy case is not a verdict that Hong Kun was a merchant. It was simply a verdict acquitting those indicted of having conspired against the Government.

Taking into consideration all the evidence in this case, it is believed that it has been shown that Hong Chow Duck is unlawfully in the United States as alleged in the warrant for his arrest, and, as further alleged, during the hearing accorded him and on which charge he was placed upon notice.

RECOMMENDATION:

It is respectfully recommended that Hong Chow Duck, Chinese alien, be ordered deported to China on the grounds that he is in the United States in violation of Sec. 6, Chinese Exclusion Act of

May 5, 1892, as amended by the Act of Nov. 3, 1893, being a Chinese laborer not in possession of a Certificate of Residence, and that he has been found in the United States in violation of Rule 9, Chinese Rules, and of the Supreme Court Decision on which such rule is based, having secured admission by fraud, not having been at the time of his entry the minor son of a member of the exempt classes.

(Sgd) Robert F. Davis
 Robert F. Davis,
 Immigration Inspector.”

Thereupon the matter came before the Board of Review for examination, which gave the following review of the case, which was approved by the Assistant to the Secretary: (Ex. “A” 55, 54)

“55593/223 San Francisco May 24, 1927

In re: HONG CHOW DUCK (DIP) Aged 19.

This case comes before the Board of Review in warrant proceedings.

No local counsel. Attorneys John L. McNab and Bert Schlesinger represented Hong Chow Duck at San Francisco and have filed a brief in his behalf.

Hong Chow Duck was accorded hearings under the warrant for his arrest by Inspector Robert F. Davis on March 3, 1927, March 7, 1927, and March 14, 1927. He is now at large under bond in the sum of \$3,000.

Hong Chow Duck was admitted to the United States as the minor son of a merchant at San Francisco, California, ex ss “President Taft” on January 3, 1924, it being claimed that he was the son of Hong Kun, alias Hong Yee Won. Hong Chow Jung, an alleged brother of Hong Chow Duck, applied for admission ex ss “President Lincoln” on July 11, 1924, and was excluded on the

ground that his alleged father was not a merchant within the meaning of the Chinese Exclusion Act during the period of one year prior to his arrival.

It will be seen that one year prior to July 11, 1924, is six months lacking eight days before the arrival of Hong Chow Duck. In the case of Hong Chow Jung, evidence was obtained indicating that the alleged father had dug clams, and carried clams to the city and disposed of them.

After Hong Chow Jung had been excluded, Hong Kun and Hong Chow Duck were tried for conspiracy to violate the Immigration Law. The Jury found them not guilty. Nevertheless, it remains a fact that Hong Kun, while not admitting that he had dug clams, did admit at the trial that he bought clams from another Chinese, going and getting them, sometimes helping to shuck them if he was in a hurry to get a train and they were not ready, and that he sold them, also that the mercantile company with which he claimed connection does not sell clams. It, therefore, appears that Hong Kun did perform manual labor not necessary to the conduct of the mercantile business with which he claimed connection, during the period just prior to the admission of Hong Chow Duck. He was, therefore, not a merchant within the meaning of the Chinese Exclusion Act at that time.

The charge that Hong Chow Duck has been found within the United States in violation of Section 6, Chinese Exclusion Act of May 5, 1892, as amended by the Act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence, is not very well sustained. Hong Chow Duck was formally admitted and is the possessor of a certificate of identity.

It is recommended that Hong Chow Duck (Dip) be deported to China, via San Francisco, at the expense of the steamship company which brought him to the United States on the ground:

That he has been found within the United States in violation of Rule 9, Chinese Rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes.

While this charge was not in the warrant for his arrest, he was placed on due notice thereof at one of the hearings granted him under the warrant.

Howard D. Ebey,
Acting Chairman, Secy. & Comr.
Genl's Board of Review.

WCW/ws

So Ordered:

A. E. Cook

Assistant to the Secretary."

Subsequently a further hearing was had, and the matter again came before the Board of Review, September 30, 1927, when the following opinion was given which was approved and so ordered by the Assistant to the Secretary: (Ex. "A" 117, 116)

"55593/223 San Francisco September 30, 1927

In re: HONG CHOW DUCK (DIP), Aged 19.

This case comes before the Board of Review in warrant proceedings.

Attorneys Ellwood P. Morey and William H. White have filed a brief and argued the case orally before the Board of Review. Attorneys McNab, Schlesinger, and Wright represent Hong Chow Duck at San Francisco.

Hearings under the warrant for the arrest of Hong Chow Duck were held on March 3, 1927, March 7, 1927, March 14, 1927, July 20, 1927, August 5, 1927, and August 16, 1927, at San Francisco, California. Some of these were conducted

by Inspector Robert F. Davis, and others by Inspector T. E. Borden. The alien is now at large under bond in the sum of \$3,000.

Hong Chow Duck was admitted to the United States as the minor son of a merchant at San Francisco, California, ex ss "President Taft" on January 3, 1924, it being claimed that he was the son of Hong Kun, alias Hong Yee Won. Hong Chow Jung, an alleged brother of Hong Chow Duck, applied for admission in July, 1924, and was excluded on the ground that his alleged father was not a merchant within the meaning of the Chinese Exclusion Act during the period of one year prior to his arrival. In the case of Hong Chow Jung, evidence was obtained indicating that the alleged father had dug clams, shucked clams, and carried clams to the city and disposed of them. Hong Chow Duck's attorneys claim that this record should not be used against their client because Hong Chow Jung withdrew his appeal and permitted himself to be deported because he got tired of being detained for so long a time at Angel Island. The fact is he would have been deported any way although he might have delayed his deportation until after his appeal had been considered by the Department if he had not withdrawn his appeal. The fact that a jury failed to convict Hong Chow Duck, his alleged father, and the manager of the company with which the alleged father claimed connection, on a conspiracy charge is certainly not evidence that Hong Chow Duck's father was a merchant for the period of one year prior to Hong Chow Duck's arrival at San Francisco. In fact, the entire record of testimony taken in the court, consisting of the testimony of a large number of witnesses, has been introduced into the record. This testimony is sufficient in itself to show that Hong Kun, the alleged father, obtained clams from another Chinese, sometimes shucking them himself, and carried them to San Francisco or to Oakland. A number of witnesses testified to this effect, and

Hong Kun himself admitted it. The evidence also shows that, although Hong Kun denies having dug clams, he was seen with the paraphernalia necessary for such work and dressed in a manner indicating that he might be engaged in that work. The question before the Department is not whether or not Hong Kun was connected with the company in which he claims to have been a partner. He may have been connected with that company and he may have been employed there a part of the time, although it is hardly possible that he could have been employed there all the time during the year in question, as claimed. His connection with the company may even have extended throughout the year, but the evidence shows that within the year prior to the arrival of Hong Chow Duck, he performed manual labor not necessary to the conduct of the mercantile business of the company upon his connection with which depends his mercantile status. It is admitted that that company does not deal in clams, and it is shown that Hong Kun performed manual labor in connection with his obtaining and disposing of clams. He did not sell the clams at a fixed place of business, and the entire business in clams conducted by him was outside of the definition of a merchant as defined by the Chinese Exclusion Act. There is no evidence that he had ceased to conduct the clam business prior to Hong Chow Duck's arrival at San Francisco. It is positively shown that he had not been a merchant within the meaning of the Chinese Exclusion Act for the full period of one year prior to Hong Chow Duck's arrival, and it is not shown that he was a merchant within the meaning of that Act for any period whatever prior to that time.

It is recommended that Hong Chow Duck (Dip) be deported to China at the expense of the steamship company which brought him to the United States on the ground that:

He has been found within the United States in violation of Rule 9, Chinese Rules, and of

the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes.

While this charge is not in the warrant for his arrest, he was placed on due notice thereof at one of the hearings accorded him under the warrant. A warrant for his deportation was issued under date of May 25, 1927, but the case was later reopened for the acceptance of additional evidence.

Howard D. Ebey

Acting Chairman, Secy. & Comr.
Genl's Board of Review.

WCW/ws

So Ordered;

A. E. Cook

Assistant to the Secretary."

There was a subsequent request for a reopening and a stay of deportation ordered (Ex "A" 120); such request for reopening was given consideration by the Board of Review in the following opinion, approved by the Assistant to the Secretary: (Ex. "A" 126)

"55593/223

November 8, 1927.

SAN FRANCISCO

In re: Hong Chow Duck or Dip.

This case comes before the Board of Review in warrant proceedings upon the request for reconsideration of the order of deportation dated September 30, 1927.

Attorney Ellwood P. Morey of this city heard.

The attorney herein contends that the Department has incorrectly applied the law in this case and that the order is not sustained by the evidence. The question herein is whether the alleged father of the alien was a domiciled Chinese

merchant during the year prior to June 12, 1923, and whether during said period he performed manual labor not necessary to the conduct of his business.

While the record contains evidence to the effect that the alleged father of the alien owned an interest in a mercantile business, the record also shows that within said period the alleged father was engaged in the performance of manual labor not necessary to the conduct of his mercantile business. The testimony shows that shortly before Christmas, 1922, the alleged father rented a shack on the shore of San Francisco Bay, for which he paid \$2.00 per month; that he lived in said shack, and that he has been seen on numerous occasions dressed in old working clothes, wearing high rubber boots; that while so dressed he has been seen taking a boat and proceeding in the direction of the clam beds; that he had with him a clam shovel commonly used for clam digging; that he has been seen to leave the boat on his return trip with cans containing clams; that he has been seen to "shuck" clams brought with him on his return trip; that he has been seen on many occasions boarding a local train bound for the city carrying with him two cans swung on each end of a pole, said cans containing clams; and that on these occasions he rode on a commuter's ticket, said trips being frequent, some times every day and some times at longer intervals.

While stress is laid on the fact that no witness testified that he saw the alleged father digging clams, there is no question that the proof is ample to show that he performed manual labor in connection with the clam business. The law does not specify that the manual labor shall be of any particular kind.

No reason appears why the outstanding order of deportation in this case should be changed,

and it is, therefore, recommended that the order stand.

L. Paul Winings

Chairman, Secy. & Comr.
Genl's Board of Review.

HDE:hms

So Ordered:

A. E. Cook

Assistant to the Secretary."

The warrant of deportation in the hands of respondent, as the result of proceedings detailed, directed the deportation of petitioner upon the ground that he

"is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit,

The Chinese exclusion law, in that he has been found within the United States in violation of rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes." (Ex. "A" 57)

On November 12, 1927, the petition for a writ of habeas corpus was filed in the district court. The respondent demurred thereto; at the hearing it was stipulated and ordered that the immigration records be considered a part of the original petition. (R. 13) The demurrer was sustained and the petition denied. The records so referred to are perhaps too voluminous to print in the transcript of record but have been forwarded to this court by order (R. 19), and are the following:

Exhibit "A": The record on the hearing which resulted in the deportation warrant.

Exhibit "AA": A certified copy of the transcript of the testimony taken in the criminal case referred to, submitted at the same hearing.

Exhibit "B": The record of the proceedings before the immigration bureau at the time of the original application for entrance made by appellant in 1924, at which time he was allowed to enter.

Exhibit "C": Three several affidavits preliminarily submitted in connection with the same application.

Exhibit "D": The record of the preliminary investigation of the immigration authorities in 1905 in respect to the admission of appellant to the United States the previous year, and which contains reports of inspectors and sworn statements secured by them.

Exhibit "E": The record of the departures from the United States and return thereto of Hong Kun, the father of petitioner.

Exhibit "F": The partnership record of the institution known as Sam Hing Company.

Exhibit "G": The record of the application for entrance to the United States of one Hong Chow Jung in 1924, he being a brother of appellant; the proceeding resulted in his exclusion.

Exhibit "H": Preliminary affidavits in the matter last mentioned.

Exhibit "I": The record before the immigration bureau in respect to one Wong Non.

The testimony taken in the criminal case was referred to, as well as the other records so designated as exhibits, and were put in evidence at the instant hearing without objection. (Ex. "A" 70)

There are a number of assignments of error directed perhaps to specific legal propositions claimed to be involved in the case, but they amount to no more than an assignment that the court erred in sustaining the demurrer and dismissing the petition for writ of habeas corpus, which, indeed, was the only order the court had ever made in the premises.

There is no claim or suggestion that there was any specific unfairness, or the application of any erroneous rule of law in the deportation proceedings. Petitioner was there represented by counsel and accorded all rights to which he was entitled under the law or the regulations. In a word, the single claim must necessarily be that there was insufficient evidence to justify the decision of the Secretary of Labor, or perhaps more accurately, since the burden of proof was upon appellant, the claim would be that the Secretary of Labor could not reasonably have taken the view of the evidence which he did take in making the order, or in plain words, that he acted unreasonably.

STATUTE INVOLVED

Section 6 of the Act of May 6, 1882, as amended and added to by act of July 5, 1884 (22 Stat. L. 58; 23 Stat. L. 115) contains the following:

“Provided, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word ‘merchant’, hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.”

Section 2 of the Act of November 3, 1893 (28 Stat. L. 7) contains the following:

“The term ‘merchant’ as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, *and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.*” (Italics ours)

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SHOW THAT THE CHINESE HONG KUN COULD NOT QUALIFY AS A MERCHANT DURING THE YEAR 1923; IT WAS SUFFICIENT TO SHOW THAT WITHIN THE MEANING OF THE STATUTE QUOTED HE WAS SHOWN TO HAVE ENGAGED IN THE TAKING, DRYING OR OTHERWISE PRESERVING OF SHELL FISH, AND THAT HE DID ENGAGE IN THE PERFORMANCE OF MANUAL LABOR NOT NECESSARY IN THE CONDUCT OF HIS BUSINESS AS A MERCHANT.

The controverted question in the instant case was whether Hong Kun, the father of appellant, was shown to have been disqualified as a merchant under the statutes quoted. Appellant was not entitled to enter the United States or to remain therein in any capacity other than the one advanced, to wit, that he was the minor son of a Chinese merchant. The alien Hong Kun was a Chinese person; had been in the United States for a number of years, and was able to show that he had an apparent connection with a conceded mercantile firm, whether nominal, fictitious, or whether in spite of such connection he was disqualified from being a merchant by the terms of the statute remained to be considered. In considering the aspect

of the case now presented, of course within the conflict of evidence rule, attention need only be given to the testimony of the witnesses for the government which would tend to support the charge.

It was shown, to use the words of the statement of the Board of Review, (Ex. "A" 126) that shortly before Christmas 1922 Hong Kun rented a shack on the shore of San Francisco Bay for \$2 per month; that he lived in the shack; that he was seen on numerous occasions dressed in old working clothes, wearing high rubber boots, and that while so dressed he was seen taking a boat and proceeding in the direction of the clam beds; that he had seen with him a clam shovel commonly used for clam digging; that he had been seen to leave the boat on the return trip with cans containing clams, and that he had been seen to shuck clams brought with him on the return trip; that he had been seen on many occasions boarding a local train for San Francisco, carrying with him two cans slung on each side of a pole containing clams; that on these occasions he rode on a so-called commutation ticket; that the trips were frequent, sometimes every day and some times longer.

As to this it was shown by the testimony of Enio Jussila given before the Department of Labor March 1, 1925, that he recognized the Chinese Hong Kun, knowing him as Sam Lee, or Old Sam; that witness's mother rented to him a shack the latter part of December, 1922, or the first of January, 1923, and witness had known him since that time. Asked, "What does this old Chinaman do?" the answer was, "Dig

clams." Asked if he occupied the shack continuously, witness said that he was there all the time, except for a night or two when he goes to Pinille to dig, just gone over night. Witness saw him since 1922 at least once a week, and that witness went to his place once a week in all. Witness never knew him to do anything else but to dig clams. (Ex. "B" 50)

At the hearing before the immigration authorities in the instant proceeding there was also put in evidence, without objection, the transcript of the evidence of the witnesses for the government given at the trial of a conspiracy indictment against appellant and Hong Kun and others, wherein the question whether during 1923 Hong Kun was a clam digger was given attention. Certain extracts from the testimony of such records appear in Exhibit "A" (p. 19) and may be referred to. Thus the same witness Enio Jussila said that he had known Hong Kun since around Christmas, 1922; that he knew he lived at the shack referred to, pictures of which were shown and appear in the present record; that Hong Kun lived there until some time last year, which would be 1925. Witness visited the shack "at least two or three times a week, more or less, probably more." Asked what witness saw him doing around the shack, he said: "The first year I saw him going out in his boat or coming back; he was dressed in old clothes", and witness would see him around the shack, sometimes opening clams or just around there doing nothing; sometimes coming back he would have clams. Witness never saw clams in the boat but had seen him taking buckets

up from the boat unto the wharf and later did see him opening the clams. He had on hip boots and a clam shovel; would be seen going out in a boat most any time, depending on the tide.

Other witnesses connected with the Southern Pacific Railroad Company testified to seeing Hong Kun board a local train at High Street, Alameda, for a year and a half. He generally got off with two cans on each end of a pole over his shoulder; full going over, coming back they would be light. A number of these witnesses, while testifying to the frequency of the journeys and so describing them, did not observe the contents of the cans but two or more of them did see that they contained clams.

Witnesses were presented by the government to prove that Hong Kun lived at the beach near Alameda, regularly carried on the calling of fishing for clams, preparing them in his shack and carrying them to San Francisco for sale. It might have been expected that different witnesses would observe different operations or circumstances, and would be unable to depose to an element in the transaction but which element would be covered by other witnesses. Thus a number of witnesses saw him go daily from his home in Alameda carrying buckets on poles, the contents inferred by them but otherwise unknown, while in a couple of cases witnesses were produced who knew that the cans contained clams.

Thus witness *Worderlick* was a railroad conductor on the Alameda Loop twenty years continuously. He

had seen Hong Kun traveling on the trains between Alameda and the City approximately ten or twelve years, as a general thing carrying cans, sometimes two of them on a pole over his shoulders, and witness observed that he had clams in the cans. (Ex. "AA" 52) He boarded the train at various times, some times in the morning, sometimes at noon, and sometimes in the evening, at South High Street; generally he was alone; he had a commutation ticket.

Witness *Raddertz* lived in the vicinity, identified Hong Kun, saw him many times. Some times saw him every day, maybe five or six times, and he would go with baskets and cans to town, to the City. He had tin cans. They would hold maybe six gallons. He had them fastened with paper and bound around. He lived in the shanty at the wharf, maybe two and one-half years, or three years. Witness goes by there every day (Ex. "AA" 64). When low tide came in he took buckets and a spade and oars and put them in a boat and then he rowed away. When it came in full, when he could land, witness saw him lift something up; never looked in the buckets to see what it was. (Ex. "AA" 63)

Witness *Davies* lived on Madison Street in Alameda, two blocks from the water front, for twelve years—up to 1926. Knew Hong Kun. He lived in a shack at the foot of the street two blocks away. Witness would see him some times every day and some times not for a week or a month, just according to when witness happened to be out in front, he was carrying cans down the street, sometimes on a pole,

sometimes in his hand. Witness saw clams in the cans. Hong Kun was dressed in working clothes. (Ex. "AA" 66)

Witness *Ruf* knew Hong Kun three years prior to the trial. Saw him in his old clothes and rubber boots; saw him going out in the boat after clams, that is, he had boots on, and his shovel and his buckets. Witness helped him with a bucket of clams at one time. Witness had seen him at all times, morning and noon and throughout the day. Witness would see him at 7 o'clock around his place, going in and out; always saw him carrying clams in cans. Witness never saw him engaged in any other work than the clam business during the three years. (Ex. "AA" 75)

Witness *Galvin* knew Hong Kun; knew him in '23 up to April '24; saw him before he moved into the Jussila shack and all the time that he lived there. (Ex. "AA" 78) Witness saw him carrying clam buckets with a stick over his shoulder and two pails, one on each end; witness knows clams were in the cans; witness went to the shack to buy clams. (Ex. "AA" 79) On one occasion witness saw Hong Kun in Oakland. Recognized him. He had some clams in a bucket and people wanted to buy them, and he sold some and went to get paper to wrap them and witness watched his bucket until he came back. Witness saw him taking a train there five or six times; he had clams in the bucket. (Ex. "AA" 80)

Witness *Paladini* knew Hong Kun over twenty years and had dealings, buying clams from him at

his place of business in San Francisco. He brought them there on a stick with cans on both ends, thirty or forty gallons at a time, several times a week, over a period of maybe ten years. (Ex. "AA" 82) This witness said the last time Hong Kun brought clams to him was when Hong Kun came back from China. At that time he asked witness to buy clams again and he bought a few and stopped because one day Hong Kun wanted to charge more gallons than he bought. Witness stopped and has not done any business with him since. (Ex. "AA" 83) It is true that this witness does not cover a period as recent as the period under question, but it is significant, nevertheless, that it showed that Hong Kun was for at least ten years in the very business the other witnesses say he was engaged in; carried it on the same way; and it was a fair inference that in doing the acts shown to have been done in 1923 he was carrying on the same business but selling to another dealer.

Witness *Mrs. Jussila*, testifying at the trial, said that she owned a shack at the foot of Madison Street, Alameda; and identified a photograph, Government's Exhibit 5; that she had the place about 5 years; knew Hong Kun and that a little before Christmas four years before, he moved there, rented it from the witness for \$2.00 a month and regularly paid his rent.

The Exhibit referred to was a picture of a shack which was found in the record enclosed in an envelope (Ex. G 210)

Witness *E. Jussila*, the son of the preceding witness, knew Hong Kun; knew that he moved into the shack

referred to around Christmas, 1922; recognized the photograph; said that Hong Kun lived there until toward the end of last year (1925). Witness would very often go to the shack, at least two or three times a week, probably more, and would see him around the shack almost every time; (Ex. "AA" 40); saw him go out in a rowboat or coming back; dressed in old clothes; would see him around the shack opening clams; sometimes coming back in the boat he would have clams. Witness saw him taking clams off the boat on to the wharf. He wore hip boots and had a clam shovel; would see him in the boat going out or coming back most any time depending on the tide; saw him on the street carrying buckets, one on each end of a stick over his shoulder. (Ex. AA-41).

Witnesses *Geary, Lee* and others, were conductors or employees on the local railroad, testified to seeing Hong Kun board the local train carrying cans at the end of a pole. (Ex. "AA"-47, etc.) Witness Lee was a conductor on the Alameda loop and saw Hong Kun getting on at South High Street going on the train dressed like a working man carrying cans covered with paper. Sometimes he would get on every day for awhile, and then witness would not see him for two or three days. Sometimes he would board in the morning, and sometimes around noon. This extended for the last three years.

Other witnesses, to which particular reference will not be made, also gave testimony in support of the charge.

Hong Kun testified at the criminal case, but in the aspect of the case now presented his testimony would be important only in considering whether he made an explanation consistent with the proven case of the government, that is, does he accept the testimony of the government witnesses as true and make a consistent explanation thereof.

It is seen that he places himself in direct opposition to such witnesses. They say that he rented his shack and lived there, and he denies that he ever lived there. (Ex. "AA" 130) He would have it believed that he was engaged almost wholly in connection with the mercantile establishment of the Sam Hing Company, while according to the witnesses, the greater part of his time was spent in the shack at Alameda. He denied that he lived at Alameda any of the time. (Ex. "AA" 130) He denied that he dug clams but made no explanation of why he should go out from the shack in a boat with a clam shovel and return with clams. He would have it believed that he merely sold clams incidentally for another, while according to the witnesses he had been engaged in carrying the clams on the train for years. He would admit that he had earlier dug and sold clams to Paladini, but claims that he had discontinued, but he made no explanation of the time or the circumstances of the discontinuance. According to Paladini, business would have been done as late as December, 1921, after the return of Hong Kun from China. (Ex. E p—) He admitted significantly, moreover, that the establishment with which he claimed connection did not deal in clams. (Ex.

“AA” 126). He thus places himself in contradiction with a number of the government’s witnesses, which fact in itself would have authorized the Secretary of Labor to deem that his credibility was impaired.

Another fact may be noted. It is well understood that when a witness being examined evades an answer and endeavors to argue to the contrary, or even answers and endeavors to add an argument to the contrary, he is usually evading the truth or testifying untruthfully. This feature is found in the Hong Kun examination. Thus asked if he lived in Alameda during the time in question, he answered, “No, *why should I go over to Alameda to live?*” (Ex. “AA” 130) Again asked if he ever wore any hip boots while he was peeling clams the answer was, “Why should I wear them?” (Ex. “AA” 131) Asked if he ever used a clam shovel while he was over there, he answered, “What should I use it for?”

It is to be noted that the two white witnesses—Castro and Arnone, who originally testified in support of Hong Kun’s mercantile status, were produced as witnesses for the defendant, and upon examination showed that while they knew the Sam Hing Company was a mercantile institution, and at times had seen Hong Kun about the place, said with reference to the affidavit that they were asked to make it out. Thus Castro testified (Ex. “AA” 107) that he saw him around there; and took it for granted from him that he was a partner as he told me he was a partner; didn’t inquire in full detail that he was a partner or not; took it for granted that he was a partner as he

told him. It is thus seen that the witness had no knowledge as to the decisive factor in the case. And the circumstances of Hong Kun's obtaining this affidavit would have been taken as impairing Hong Kun's credibility.

The testimony so making for the support of the order of the immigration authorities, appears in Exhibit "AA" pages 1 to 85 and in Exhibit "B", page 50.

It is submitted that the case of

Chin Hong v. Nagle, 7 F. (2d) 609,

is directly in point. In that case several witnesses had testified that the father of the applicant had been seen on numerous occasions marking and selling lottery tickets in a lottery room connected with the mercantile establishment in which he was a partner. The father claimed that he had no connection with the lottery but when found there was merely taking the place of the man who ran it, while the latter was out. This Court said:

"The testimony was conflicting, and whether or not the decision of the Commissioner and the Secretary was against the weight of the evidence we are not called upon to decide. Certain it is that the evidence of the mercantile status of Chin Lung was not of such a conclusive character that to refuse to be guided by it was abuse of official discretion."

The Court further said:

"The appellant contends that the occasional activities of Chin Lung in conducting the lottery should not be held to deprive him of the status

of a merchant and cites our decision in *Ow Yang Dean v. United States*, 145 F. 801, 76 CCA 365. But in that case the manual labor performed by the merchant was found to be only such as was connected with and necessary to the conduct of his business as such merchant and permissible within the express language of the statutory definition of the term 'merchant', whereas in the case at bar the activities of Chin Lung in conducting a lottery business had no connection whatever with his occupation as a merchant."

Another pertinent authority was the case of

Lew Juen Wo v. U. S., 184 Fed. 685,

wherein this court affirmed the decision of the District Court upholding an order of deportation and reviewed the pertinent authorities.

In the case of

Lew Jim v. United States, 66 Fed. 953,

this court gave consideration to the same question, and held that a Chinese person who during his residence in the United States was engaged in business as a member of a firm of dealers in fancy goods but occasionally up to a year previous to his departure for a temporary visit, worked for short periods as a house servant in order to accommodate an old employer at times when he was without a servant, was engaged in manual labor within the meaning of Section 2 of the McCreary Act. Justice McKenna wrote the opinion and said:

"The Chinese exclusion acts are undoubtedly directed to the exclusion of laborers, but to effectually accomplish this purpose it became necessary not only to make certain the definition of

the term, but to make also certain the definition of the term 'merchant,' under which name impositions upon the law were practiced. This was done by the McCreary amendment to the Geary law, and the burden of proof was cast on the Chinaman to affirmatively establish his character as a merchant."

and added,

"The provisions of the section are very strict and we think appellant engaged in manual labor within its meaning."

A similar ruling was made by this court in the case of

Lai Moy v. United States, 66 Fed. 955,

Judge McKenna, giving the opinion for the court, said:

"It will be observed that the definitions of the act are very careful and confined, and we may not enlarge them. The designation 'merchant' does not include, comprehensively, all who are not laborers, but strictly 'a person (to quote the act) engaged in buying and selling merchandise.' To fabricate merchandise, as appellant did, is not to buy and sell it. Nor may both be done, for the 'merchant' may not (again to quote the act) 'engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant,'—that is, in buying and selling merchandise; and the manual labor which is precluded is skilled as well as unskilled. One-half of appellant's time was engaged in cutting and sewing garments. This was manual labor not necessary in the buying and selling of merchandise. If we may indulge this, we may indulge more, and all artificers would be excluded from the act provided they worked for themselves or mingled with their proper work any traffic in merchandise."

The case last cited, was cited with approval by this court in the case of

Chan Gai Jan v. White, 266 Fed. 869.

The same rule was applied by this court in the case of

White v. Fong Gin Gee, 265 Fed. 600,

reversing the judgment of the District Court and sustaining the ruling of the Secretary of Labor in holding that the alien in the particular case was disqualified as a merchant under the act in that he performed labor not incident to such mercantile business.

In a word, there can be little contention as to the principles of law herein invoked, and which the Department was seeking to apply. Merely having an interest in a mercantile firm does not render one a merchant within the meaning of the act if he carries on an outside employment wherein he performs manual labor of any character.

We may add, of course, that it is not the function of the Courts to weigh the evidence in proceedings such as these before the executive officers.

White v. Young Yen, 278 Fed. 619, CCA 9th Circuit,

All questions of fact and of the credibility of witnesses are within the jurisdiction of the immigration authorities.

Chin Shee v. White, 273 Fed. 801,
White v. Chan Wy Sheung, 270 Fed. 764,

If there is any evidence, however slight, before the

immigration authorities giving support to their findings, such findings are conclusive on the court.

Jeung Bock Hong et al. v. White, 258 Fed. 23.

Other minor contentions may be noticed appearing from the petition for the writ only, rather than from any argument submitted:

(a) There is some suggestion in the petition that petitioner should be allowed to remain in the United States because he was admitted by the immigration authorities as the son of a merchant.

Prior decisions of the immigration authorities are not *res adjudicata*.

Quon Quon Poy v. Johnson, 273 U. S. 352.
Lee Hing v. Nagle, (CCA 9th) 295 Fed. 642.

In the case of

White v. Chan Wy Sheung, 270 Fed. 764, 767,
 the Circuit Court of Appeals for this Circuit said:

“The board of immigration is not a court. It is an instrument of the executive power, and its decisions do not in a technical sense constitute *res adjudicata* (*Pearson v. Williams*, 202 U. S. 281, 285, 26 S.Ct. 608, 50 L. Ed. 1029) and the Department is not bound by its prior decisions in admitting aliens to the United States” (cases cited).

The same doctrine was reiterated by the Circuit Court for this Circuit no less recently than November 21, 1927, in the case of

Fung Yun Ham v. Nagle, 22 F. (2d) 600.

(b) It is set forth in the petition that petitioner has

since his entry acquired an interest in the Canton Bazaar, an alleged mercantile establishment.

In answer to this contention it is believed to be sufficient to cite the case of

Wong Fat Shuen v. Nagle, 7 F. (2d) 611,
wherein the Circuit Court for this Circuit said:

“and the entry having been unlawful, he could not thereafter acquire an exempt status by engaging in the business of a merchant in San Francisco (citing United States v. Chu Chee, 93 Fed. 797, 35 CCA 613; Ex parte Wu Kao (D. C.) 270 Fed. 351)”.

See also

Ewing Yuen v. Johnson, 299 Fed. 604
Tulsidas v. Insular Collector, 262 U. S. 258
In re Low Yin, 13 F. (2d) 265.

(c) In the brief of appellant it is stated, respecting the result of the trial of the criminal case referred to:

“We do not contend that the department was estopped by the verdict of the jury in the conspiracy case; but we do contend that the same issue that was before the Department in the deportation proceeding was tried by that jury, and that the Department should have regarded that decision as very persuasive, indeed, though not legally conclusive.”

It is thus conceded that the verdict would not be *res adjudicata* in this case; the verdict in the conspiracy case would indeed not be deemed *res adjudicata* in a trial upon the substantive charge, or an acquittal on the one would not bar a conviction on the other, and *a fortiori* the result referred to would not

prevent the Secretary of Labor from finding the truth of the facts charged in his deportation warrant.

We cite an analogous case that of

Weinbrand v. Prentis (CCA Sixth Circuit)
4 F. (2d) 778,

wherein the detained had been ordered deported because of connection with a house of prostitution. Contention was made that two acquittals of an inmate of the said house on charges of resorting to a house of ill-fame and being a common prostitute, respectively, and acquittal of the detained and another inmate on a charge of immoral conduct at the same place, rebutted the conclusions of the immigration authorities. The Court said:

“It should go without saying that neither of these acquittals is a technical adjudication as against the correctness of the charge on which the deportation in question was based; nor do such acquittals furnish assurance of unfairness in the Inspector’s decision of the question of fact involved in the deportation proceedings.”

IN CONCLUSION we therefore show that the instant case, as far as concerns the disputed element, is a case of conflict in the testimony as to which decision of the immigration authorities, in accepting the testimony of witnesses, is final. Their action does not depend upon the quality or character of alleged discrepancies, although the appellant would have the burden of proof. It is a case where the authorities could properly find, believing the witnesses submitted on behalf of the Government, that Hong Kun, during the year 1923, the relevant period, as well as other times

before and after, was not a merchant within the meaning of the provisions of the statute hereinabove cited. He was engaged in "taking, or otherwise preserving shell fish for home consumption," and performing labor, being manual labor, which was not necessary in the conduct of his business as a merchant.

The judgment of the District Court was therefore proper and should be affirmed.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

T. J. SHERIDAN,
Asst. United States Attorney,
Attorneys for Appellee.